Order, the ICC stated, "[u]ltimately, the same rates [for interexchange access and local usage] should apply for termination regardless of the type of originating carrier [long distance or local], and we formally establish that goal here."[15]

However, as discussed above, it appears that the FCC does not have authority to implement rules as broad as it proposes, regardless of the potential benefits of nationwide requirements. The FCC may not fully recognize the ramifications of its tentative conclusion in paragraph 38 that the jurisdictional roles of the FCC and State commissions must be parallel. Since it will be the States' responsibility to implement sections 251 and 252 of the 1996 Act and the FCC's rules, State authority has been extended to both interstate and intrastate services, as the FCC recognizes. Because the States are required to approve negotiated agreements and statements of generally available terms and to arbitrate when requested, it is clear that Congress intended such a role for the States, regardless of the type of traffic for which such facilities are used. This authority will allow the States to prevent arbitrage between interstate and intrastate services that might otherwise arise because of jurisdictional differences. The FCC has not addressed how shared jurisdiction would affect current interstate or intrastate

[15] See Customers First Order at 98.

tariffing requirements or rate or price regulation mechanisms. These issues must be addressed.

The FCC has requested comments on the relationship between sections 251 and 252 and the FCC's existing enforcement authority under section 208 of the Communications Act of 1934. NPRM at para. 41. The FCC asked, "Does this mean that the [FCC] has authority over complaints alleging violations of requirements set forth in sections 251 or 252?" Id. It is the ICC's position that section 208 cannot be interpreted in such a manner as to eliminate the remedies provided for in sections 251 and 252.

Specifically, section 251(c)(1) imposes on incumbent LECs the "duty to negotiate in good faith in accordance with the provisions of section 252..." Section 252(a) provides for voluntary negotiation. Sections 252(a)(2) and (3) provide for mediation and arbitration, respectively. Section 252(e) provides for State commission approval of interconnection agreements arrived at by negotiation or arbitration. Section 252(e)(3) permits the State commission to enforce its own laws and rules in its review of the agreement. Section 252(e)(4) sets out specific time requirements the State commission must follow. As discussed in more detail in Section III of these comments, if a State commission fails to carry out its responsibilities, the FCC is to preempt the State commission's jurisdiction and assume the responsibilities of the State commission with respect to a specific proceeding. Finally, any aggrieved party to a State

commission decision may appeal the decision to the appropriate Federal district court.

A decision to permit a party to file a section 208 complaint with the FCC regarding sections 251 and 252 issues would circumvent the remedies in the 1996 Act. Such a decision would prohibit a State commission from enforcing its own laws, as permitted by the 1996 Act. The 1996 Act specifically states that the FCC shall preempt the State commission if it fails to carry out its responsibilities. To allow a direct section 208 complaint would permit FCC preemption without any showing that the State commission has failed to carry out its responsibilities. In fact, a section 208 complaint would prevent the State commission from carrying out its statutory duties. Finally, appeals to State commission decisions are to the appropriate Federal district court, not the FCC.

To permit section 208 complaints regarding sections 251 and 252 activities would be entirely inconsistent with sections 251 and 252. However, the ICC wishes to point out an earlier statement of the FCC: "We note that sections 251 and 252 do not alter jurisdictional division of authority with respect to matters falling outside the scope of these provisions." NPRM at para. 40. After the agreements are implemented, whether through voluntary negotiations or through arbitration, sections 206-208 would be available, except where an aggrieved party alleges an agreement or statement does not meet the requirements of sections

251 and 252. In this case, an aggrieved party must bring an action in Federal district court. Section 252(e)(6).

B. Obligations Imposed by Section 251(c) on Incumbent LECs

The FCC has requested "comment on whether state commissions are permitted to impose on carriers that have not been designated as incumbent LECs any of the obligations the statute imposes on incumbent LECs." NPRM at para. 45. It is the ICC's position that the 1996 Act does not foreclose the State commissions from imposing additional obligations on non-incumbent LECs. However, the FCC should not require that the duties imposed on incumbent LECs by section 251(c) be reciprocal. Reciprocity implies that because the incumbent LECs have a duty to do something, all other LECs should have a similar duty. An FCC rule to that effect would be inconsistent with the 1996 Act.

The 1996 Act imposes duties on all LECs. Sections 251(a) and (b). It also imposes additional duties on incumbent LECs. Section 251(c). If Congress had desired that all LECs statutorily have duties imposed by section 251(c), it could have included such requirements in section 251(b). A central purpose of the 1996 Act was to open up the local exchange monopoly to competition. This required imposing certain duties on the incumbent LECs. Imposing the additional duties on the new LECs does not necessarily further this goal. The FCC should not impose the duties on new entrants simply because negotiations

will go "more smoothly." NPRM at para. 45. Incumbent LECs are under a duty to negotiate in good faith. Further, failure by other carriers to negotiate in good faith can factor into BOC interLATA entry determinations under section 271(c)(1)(B). The FCC should not impose reciprocal obligations on a national basis simply to make the incumbent LECs and other carriers more willing to negotiate in good faith.

Concluding that the FCC should not impose reciprocal obligations does not foreclose the State commissions from imposing additional duties on new LECs if policy goals are furthered by the imposition of such obligations. For example, the ICC imposed intraLATA presubscription and line-side interconnection requirements on new LECs for policy reasons, not because of the incumbent LECs' arguments that if they should have to provide intraLATA presubscription and line-side interconnection, then the new LECs should as well.[16] The ICC determined that imposing intraLATA presubscription and line-side interconnection on new LECs would promote customer choice for a wider variety of telecommunications services, some of which may be available from the incumbent LEC. If the ICC determines for policy reasons that additional obligations should be imposed on new LECs, it will do so consistent with the provisions of the 1996 Act. Sections 251(d)(3), 252(e)(3), and 261 and section 601

[16]See 83 Il. Adm. Code Parts 773 and 790 and Orders in Dockets 94-0048 and 94-0049 (attached).

of the 1996 Act. In addition, the States are in a better position to determine the additional rules and obligations that new LECs should be required to meet.

1. Duty to Negotiate in Good Faith

The FCC seeks comment on the extent to which it "should establish national guidelines regarding good faith negotiation under section 251(c)(1), and on what the content of those rules should be." NPRM at para. 47.

The term "good faith" appears in a broad variety of contexts in American law. While numerous federal laws contain a good faith standard, research has disclosed none that appear to be useful in giving further definition to the section 251(c)(1) requirement.

The ICC strongly recommends against any attempts to define with precision the term "good faith." It is a practical impossibility to anticipate the ways in which telecommunications carriers with substantial capital, business acumen, and technical expertise could act in bad faith if they so chose. This is especially true of incumbent LECs which, in addition to possessing the foregoing attributes, operate in what have been monopoly markets for the better part of a century and can be expected to try to maintain effective monopoly status as long as they are allowed to do so.

To the extent any rules might be appropriate to focus the meaning of "good faith" in this context, resort to principles of commercial law and the law of contracts is appropriate. In order to avoid a debate that has plagued the courts as they interpret certain provisions of the Uniform Commercial Code,[17] the ICC suggests that the "good faith" standard applied under section 251(c)(1) be an objective one. Stated another way, any decision maker faced with the need to determine whether section 251(c)(1) has been violated should compare the conduct at issue with that of a reasonable person under an obligation to act in good faith, rather than attempting to divine the mental state of the alleged violator or the actual motivation for its behavior.

In terms of the specific alleged conduct of incumbent LECs which the FCC sets forth in paragraph 47, a request to keep commercially sensitive information confidential in the course of negotiations can be made in good faith. However, a carrier that would condition its willingness to negotiate on another carrier's relinquishment of otherwise available legal remedies cannot be said to be fulfilling its section 251(c)(1) duty to negotiate in good faith.

The FCC has sought comment on whether sections 252(e)(1) and 252(a)(1) "require parties that have existing agreements to submit those agreements to the state commissions for approval."

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[17] See for example, *Watseka First National Bank v. Ruda*, 135 Ill. 2d 140, 552 N.E.2d 775 (1990).

NPRM at para. 48. The FCC also seeks "comment on whether one party to an existing agreement may compel renegotiation (and arbitration) in accordance with the procedures set forth in section 252." Id. The ICC is unable to address the first question because there is a case pending before the ICC requiring it to answer the very same question.[18] However, the ICC can respond to the second question.

Initially, one must state the obvious: there are generally two parties to a contract. So the question must be viewed from each party's perspective.

The 1996 Act imposes a duty on an incumbent LEC to negotiate in good faith upon receiving a request for interconnection, service, or network elements pursuant to section 251. Sections 251(c)(1) and 252(a). If no request is made of the incumbent LEC, there is no triggering of the corresponding duty to negotiate.

From the perspective of the incumbent LEC, there is nothing in the 1996 Act that permits it to abrogate existing contracts. Any party to a contract has a legal obligation to abide by the terms of the contract. Nothing in the 1996 Act changes that legal duty. The fact that the other party to a contract may have a right to seek negotiation under the 1996 Act does not permit

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[18] See Docket 96-0114, Petition of AT&T for Commission Order Requiring LECs to Comply with Provisions of the Federal Telecommunications Act of 1996.

the incumbent LEC to force a party to negotiate, or renegotiate an existing contract. A unilateral ability to abrogate existing contracts could undo progress that has been made to date in developing local competition. At the same time, parties may amend existing contracts, if mutually agreeable.

The 1996 Act requires that the incumbent LEC submit agreements to the State commission under subsection (e) of section 252. The State commission may only reject the prior agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that the agreement, or a portion of the agreement, "is not consistent with the public interest, convenience or necessity." Section 252(e)(2)(A). Otherwise, the agreement must be approved. It does not appear that the 1996 Act permits an incumbent LEC to abrogate an existing agreement unless it, or someone else, can prove the contract requires rejection by a State commission under section 252(e)(2)(A). If the contract is rejected and a party still wishes to obtain the services from the incumbent LEC covered by the terms of a previous agreement, then the party may commence negotiations or purchase the service under generally available terms and conditions.

A party to an existing contract that is not an incumbent LEC is in a different situation. It may not be able to seek renegotiation of an existing contract, unless the contract is rejected by a State commission under section 252(e)(2)(A), but it

may request negotiation of a new agreement if the interconnection, service, or network elements requested are different from the items addressed in the existing contract. For example, a party to an existing contract for virtual collocation may not be precluded from requesting negotiations for physical collocation. An incumbent LEC must negotiate with a party if the requesting party is requesting a service that is not the same as the service covered by an existing agreement.

2. Interconnection, Collocation, and Unbundled Elements

The FCC has reached the tentative conclusion that "uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements." NPRM at para. 50. This tentative conclusion is based on the FCC's belief that national standards would speed the negotiation process by "eliminating potential areas of dispute." The FCC notes that interstate interconnection disputes arise most often in areas where the rules lack specificity, or where no rules have been adopted. The FCC seeks comment on the consequences of not establishing such specific rules for interconnection. NPRM at para. 51. Any national minimum standards for interconnection should not be bound to a single method of interconnection. There are several different methods of interconnection, including meet point arrangements, virtual

collocation, physical collocation, and direct transport via entrance facilities. Each new LEC may wish to configure its network differently. For example, one new LEC may wish to only utilize meet point arrangements while another may wish to utilize physical collocation. These decisions by new LECs to utilize different interconnection methods may vary based on technology, quality control, and/or other considerations. Therefore, the FCC should not preclude any type of interconnection method just to establish a national model; rather, any minimum national standards for interconnection should allow various types of interconnection, based on the request of the new LEC. The ICC recommends that national rules allow the requesting carrier to interconnect in a manner that it deems desirable, subject to the bona fide request, negotiation, and arbitration mechanisms discussed in these comments. Such a policy will allow requesting carriers to configure their networks in a uniform and efficient manner to compete in the local exchange market. Exceptions could be addressed by State commissions, as appropriate.

The FCC seeks comment on whether there are instances wherein the aims of the 1996 Act would be better achieved by permitting States to experiment with different approaches. NPRM at para. 51. The FCC also requests comments as to whether permitting substantial variation would make it easier for States to respond more appropriately to technical, demographic, or geographic issues specific to that State or region without detracting from

the overall purpose of the 1996 Act. Id. The FCC should allow States the flexibility to determine if additional standards are necessary based on technical, demographic, or geographic reasons. In addition, a State may determine that additional interconnection standards are necessary in order to promote efficient competition in the local exchange market.

The FCC questions whether variations in technical requirements among States would affect the ability of new entrants to plan and configure regional or national networks. In addition, the FCC requests comment regarding whether such variations would affect the entrant's ability to deploy alternative network architectures. Id. If the FCC adopts the ICC's recommendation that new LECs be allowed to select their preferred method of interconnection, subject to bona fide request, negotiation, and arbitration mechanisms, the new LECs will have the latitude to configure regional or national networks. Further, allowing the States to implement additional interconnection standards would accommodate any situation where a particular method of interconnection is more attractive in one State than in another. At the same time, a carrier would not be precluded from making a business decision to select one method of interconnection for the entire region in which it operates, or different methods based on each State's interconnection standards. Since interconnection facilities are used for both interstate and intrastate services, any additional standards imposed

by the States should also extend to interconnection for interstate services as well. See discussion regarding para. 37, infra. The ICC has the authority to require any additional interconnection standards deemed necessary to promote competition. See section 261(c).

The FCC requests comment as to whether a lack of explicit guidelines would impair a State's ability to complete arbitration within nine months of the date that an interconnection request was made. NPRM at para. 51. Explicit national minimum standards would assist the States in arbitrating interconnection requests, while more extensive national requirements may actually inhibit a State's ability to impose an arbitrated arrangement that reflects technological and market advances and/or regional differences.

The FCC also questions whether a lack of clear national standards would impair the FCC's ability to evaluate BOC compliance under section 271 within 90 days or to assume a State commission's responsibilities if the State commission fails to carry out its responsibilities under section 252. Id. While the FCC is concerned that the lack of exhaustive national rules implementing section 251 could hamper the FCC in fulfilling its responsibilities under section 271, other aspects of its review of BOC applications for interLATA services may be even more crucial. The FCC may wish to consider implementing rules or standards regarding other aspects of its section 271 responsibilities, such as criteria for evaluating facilities-

based competition (section 271(c)(1)(A)) or the public interest standard (section 271(d)(3)(C)). In addition, the minimum FCC rules could indicate alternatives beyond the minimum standards that the FCC would consider reasonable during an arbitration process, if desired.

The FCC requests that parties provide information regarding specific interconnection rules or policies that States have adopted. NPRM at para. 52. The ICC adopted rules mirroring the FCC's physical collocation rule for switched access, special access, and private line service[19], and was in the process of considering the FCC's new virtual collocation rule when the 1996 Act reinstituted physical collocation.[20] The ICC also addressed interconnection policies in the Customers First Order, in which it stated:

> Fortunately, the present arrangements among incumbent LECs provide a sound model of the physical interconnection arrangements that reasonably can be mandated for interconnection between competing carriers. ... The Commission directs that Illinois Bell offer tandem subtending interconnection arrangements to new LECs in the same manner in which it offers those arrangements to existing independent telephone companies. Customers First Order at 79-80.

However, the ICC is unable to address this issue further due to a pending docket investigating the reasonableness of Ameritech

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[19]See Orders in Docket 92-0398 adopting 83 Il. Adm. Code Part 790 (attached).

[20]See Docket 94-0480 (dismissed on April 29, 1996).

Illinois' tariff filing made in response to the Customers First Order. See ICC Docket 95-0296.

The FCC has requested comment on the relationship between the obligation of incumbent LECs to provide "interconnection" under section 251(c)(2) and the obligation of all LECs to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications pursuant to section 251(b)(5). NPRM at para. 53. It is the ICC's opinion that the two sections should be interpreted separately, and that there is no overlap between the two.

Section 251(b)(5) states that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Stated another way, LEC A shall transport and terminate a call originated by LEC B to a customer of LEC A under an arrangement that provides for reciprocal transport and termination. Section 252(d)(2)(A) on pricing standards begins with the phrase "[f]or the purposes of compliance by an incumbent LEC with section 251(b)(5)." Subsection (d)(2)(A)(i) specifically addresses "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Emphasis added. Subsection (d)(2)(A)(ii) states that the costs of transport and termination shall be determined "on the basis of a reasonable approximation of such additional costs of terminating such calls." Emphasis added. It

is obvious that the focus of sections 251(b)(5) and 252(d)(2) is on the transport and termination of calls or traffic, not the cost of providing actual facilities. The price of transporting and terminating a call will pay for transporting a call from a point on the network of one party to the customer premises on the terminating end of the call. The carrier receives no right to the use of any specific facilities by paying for the transport and termination of a call.

Section 251(c)(2) imposes on the incumbent LEC the duty to interconnect with the "facilities and equipment" of a requesting carrier for the transmission and routing of telephone exchange service and exchange access. The incumbent LEC has a duty to provide interconnection so the carrier can subsequently complete calls. Interconnection is the physical connection between the two networks. A carrier cannot take advantage of the rights under section 251(b)(5) if the incumbent LEC has no duty to interconnect the facilities and equipment of the carrier.

Section 252(d)(1) specifically applies to the rates for "the interconnection of facilities and equipment." The payment for interconnection does not pay for the transport and termination of a call received over the interconnection facilities or equipment.

In paragraphs 56-59, the FCC discusses and seeks comment on what constitutes a "technically feasible point" within the incumbent LEC's network for purposes of interconnection. In the Customers First Order, the ICC adopted the policy that,

ultimately, all carriers interconnecting with Ameritech Illinois should be offered service from the same tariff and under the same physical interconnection tariffs.[21] Since the proper interpretation of this policy is currently being litigated in ICC Docket 95-0296, the ICC will not elaborate at this time on the definition. However, some other aspects of this issue deserve comment. The ICC agrees with the FCC's tentative conclusions that a party alleging harm to the network should be required to support such a claim and that the incumbent LEC has the burden of demonstrating that interconnection at a particular point is technically infeasible. NPRM at para. 56. Such a policy will allow requesting carriers wide latitude in configuring their networks in an efficient manner.

The FCC also seeks comment on whether States should be allowed to designate technically feasible interconnection points in addition to those designated by the FCC. NPRM at para. 58. As discussed previously, the FCC should adopt minimum requirements and States should be allowed to implement requirements that go beyond the FCC's minimum rules. Minimum rules should contain a provision that requires LECs to provide interconnection at all technically feasible points, upon a bona fide request and absent a State finding that the interconnection is not technically feasible. Further, a request for negotiation,

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[21] See Customers First Order, at 79.

as provided by section 252, would be a reasonable way for potential interconnectors to seek interconnection with incumbent LECs at points in addition to those contained in FCC or State rules. If negotiations fail, the State commission could engage in arbitration, if requested, and assess the reasonableness of the request consistent with the standards in section 252(c).

The FCC seeks comment on the appropriate criteria in determining whether interconnection is "equal in quality" to that provided to itself, affiliates, or other parties, as required by section 241(c)(2)(C), and on whether national standards should be adopted. NPRM at para. 63. Since the issue of appropriate criteria regarding equality of interconnections with affiliates is pending in an Illinois proceeding,[22] the ICC will not comment on this issue. However, national minimum criteria may be helpful, to ensure at least a basic standard across regions.

The ICC agrees with the FCC's tentative conclusion that the FCC "has the authority to require, in addition to physical collocation, virtual collocation and meet point interconnection, as well as any other reasonable method of interconnection." NPRM at para. 64. The ICC agrees that section 251(c)(2) does not limit the forms of interconnection arrangements that may be requested. Section 251(c)(6) imposes the duty to provide for the

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[22]See ICC Docket 95-0443, Ameritech Communications of Illinois, Inc., Application for Certificate of Service Authority to Provide Interexchange and Local Exchange Service in Illinois.

physical collocation of equipment. The purpose of section 251(c)(6) is to eliminate any question regarding whether the FCC has the statutory authority to require physical collocation of equipment at the premises of the incumbent LEC, not to limit the type of interconnection arrangement the incumbent LEC is required to provide under section 251(c)(2).

The FCC tentatively concludes "that 'premises' includes, in addition to incumbent LEC central offices or tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities." NPRM at para. 71. The ICC agrees. The purpose of interconnection requirements is to give requesting parties access to the network without having to completely duplicate it. Just because a facility is not a central office or tandem office does not mean that the facility could not serve as an interconnection point. An FCC policy prohibiting interconnection at points other than incumbent LEC central offices or tandem offices may preclude efficient interconnections. The focus of the FCC's rules regarding physical collocation should be "facilities" rather than offices.

The FCC seeks comment on what types of equipment competitors should be permitted to collocate on LEC premises. NPRM at para. 72. Currently, the FCC's and ICC's rules governing collocation restrict the equipment that must be collocated in an incumbent LEC's central office to central office equipment needed to terminate basic transmission facilities. The FCC's stated

purpose of its Expanded Interconnection rule was to "remove barriers to competition in the provision of basic transmission services between LEC central offices and third party premises."[23] The ICC's restriction is based on the FCC's rule, rather than an independent determination. Since the FCC was not addressing competition in the local exchange market, it is not restricted in this NPRM to the same conclusion reached previously. If a competitor is leasing space that is available at a LEC's premises, then there should be no restrictions on what type of equipment can be placed in the leased space, unless the equipment would have the potential to harm the network. Such a policy will allow requesting carriers the ability to efficiently utilize their resources in order to compete in the local exchange market.

At paragraph 73, the FCC seeks comment on whether the FCC should adopt comprehensive national standards for collocation by readopting the FCC's prior standards governing physical and virtual collocation. The FCC tentatively concludes that its existing policies on expanded interconnection for interstate and special transport services should continue to apply.

There is no question that the FCC has statutory authority to require physical and virtual collocation of incumbent LECs.

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[23] See In the Matter of Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, October 19, 1992, (FCC 92-440) at 44.

Sections 251(c)(2) and 251(c)(6). The ICC agrees with the FCC's tentative conclusion that it should continue its existing policies on special access and switched transport interconnection. However, now that the 1996 Act requires that incumbent LECs provide physical collocation, the FCC should readopt its original rule insofar as it requires physical collocation as the standard, unless the parties voluntarily agree to another form of interconnection or the LEC demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations. Regarding the restriction as to the type of equipment that can be collocated in the incumbent LEC's premises, the ICC recommends that the FCC modify its expanded interconnection rule to allow any type of equipment that does not harm the network, as discussed above.

The FCC tentatively concludes that section 251 obligates the FCC to identify network elements that incumbent LECs should unbundle and make available to requesting carriers under subsection (c)(3). NPRM at para. 77. The FCC also tentatively concludes that it should identify a minimum set of network elements that incumbent LECs must unbundle for any requesting telecommunications carrier, and, to the extent necessary, establish additional or different unbundling requirements in the future as services, technology, and the needs of competing carriers evolve. The ICC agrees that the FCC should establish the minimum network elements that an incumbent LEC must unbundle,

in order to facilitate the development of local exchange competition. The States should also be allowed to require additional unbundling where necessary or based on a bona fide request.[24] This recommendation is consistent with the FCC's tentative conclusion in paragraph 78 that States may require additional unbundling of LEC networks. Further, a potential purchaser of an incumbent LEC's unbundled network elements should be allowed to request negotiation for network elements in addition to those established by the FCC or a State commission. The State commission could then evaluate the reasonableness of such a request, either through the approval process for a negotiated agreement or through arbitration if negotiations fail.

In paragraph 84, the FCC requests comments on the definition of "network element," specifically, what, if any, distinction there is between a "facility or equipment used in the provision of telecommunications service" and the service itself. The FCC correctly notes that a network element includes features, functions, and capabilities that are provided by means of such facility or equipment. "Network element" cannot be defined without regard to section 251(c)(3). Section 251(c)(3) imposes on incumbent LECs the duty to provide, "to any requesting carrier

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[24]The ICC established that a bona fide request is a request in which an interconnector states, in writing, that it will purchase loops and/or ports within six months of the date of the request. See 83 Il. Adm. Code Part 790.

for the provision of a telecommunications service," nondiscriminatory access to network elements on an unbundled basis. An incumbent LEC shall provide the unbundled network elements in a manner that permits the requesting carrier to combine them, "in order to provide such telecommunications service."

Section 251(c)(3) grants a requesting carrier that wishes to provide a specific telecommunications service, as defined by it, the right to ask for specific network elements to provide such service. The carrier can pick and choose what equipment and facilities, functions or capabilities it desires in order to provide that particular service. Or, the carrier can request the entire facility or equipment with all its inherent capabilities and functions. Section 251(c)(3) does not place a limit on the nature of a request or the use of the network elements once acquired. The only requirement is that the access to the network element be at a technically feasible point.

The definition of "network element" does not focus on the service being provided by the LEC. It speaks in terms of the equipment, facilities, functions and capabilities used to provide a service. Since section 251(c)(3) does not prohibit the carrier from packaging the network elements in any manner it wishes, the requesting carrier can sell the resulting package in any manner it wishes, depending on customer needs and willingness to pay for all or a portion of the features inherent in the package of

network elements assembled. The requesting carrier is not required to provide the service the incumbent LEC may provide by the same combination of network elements. If allowed, the requesting carrier could combine the network elements to provide a service not currently offered by the LEC.

The FCC seeks comment on whether a requesting carrier can order and combine network elements under 251(c)(3) to offer the same services as offered by an incumbent LEC under 251(c)(4). Specifically, the FCC questions whether a requesting carrier can combine unbundled elements and provide end-to-end telecommunications service. NPRM at para. 85. While the ICC is unable to address the substance of this issue due to a current open docket,[25] it recognizes benefits in addressing this issue on a national level, in order to allow consistent options among States. The FCC should base its decision on the issue of combining network elements on whether it would (a) advance competition, reduce regulation in telecommunications markets, and advance and preserve universal service (See NPRM at para. 3); (b) remove statutory and regulatory barriers and economic impediments that inefficiently retard entry, and allow entry to take place where it can occur efficiently (See NPRM at para. 12); and (c) permit states sufficient variability in fostering local exchange competition (See NPRM at para. 33).

[25]See ICC Docket 95-0458, et al., Consol., AT&T and LDDS wholesale and network services docket.

In the Customers First and line-side interconnection proceedings, the ICC concluded that the pro-competitive benefits of reducing the capital cost barrier to facilities-based entry can be achieved only if the incumbent LECs are required to sell unbundled network components to their competitors upon request.[26] It is these unbundled network components that will ultimately allow facilities-based competitors ubiquitous entry into the local exchange markets. As such, it would be reasonable for minimum national standards to identify minimum unbundled network elements that all LECs must make available upon request.

Illinois' rules require that carriers provide, at a minimum, unbundled loop and ports upon bona fide request and state that further unbundling must also be provided, upon a bona fide request, unless further unbundling is not technically or economically practicable.[27] These rules allow for changes in technologies and competitive innovation to drive the ultimate requirements for unbundled components. These or similar guidelines could be implemented by all LECs and encourages the FCC to consider the ICC's unbundling rules when and if it establishes a national standard. Determinations of technical feasibility should be left to the State commissions. Requests for negotiations under section 252 may be the appropriate vehicle for a carrier to seek to obtain unbundled network elements not

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[26] See Customers First Order at 47-48, and 83 Il. Adm. Code Part 790.

[27] 83 Il. Adm. Code Part 790.